

S

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER,
Complainant,

v.

CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL RAILROAD
COMPANY,
Respondent.

ARB Case No. 16-035
ALJ Case No. 2014-FRS-154

BRIEF OF AMICI CURIAE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AND
AMERICAN TRUCKING ASSOCIATIONS, INC.
IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community. The Chamber has participated as *amicus curiae* in several cases before the Administrative Review Board.

Many of the Chamber's member companies are employers subject to either the Federal Railroad Safety Act ("FRSA") or the many other statutes that either directly incorporate or restate the burdens of proof contained therein, *see infra*, p. 3. The Chamber's members therefore have a strong interest in the resolution of this case, which presents fundamental issues regarding the respective burdens of proof of employees and employers under those statutes.

The American Trucking Associations, Inc. (ATA) is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies. In conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation.

ATA's members have a direct interest in this case because they are subject to the whistleblower protections of the Surface Transportation Assistance Act ("STAA"), which incorporates by reference exactly the same statutory provisions regarding burdens of proof as the FRSA. Its members therefore will be directly impacted by any change to the law governing those standards of proof.

The Chamber and ATA appreciate the Board's call for interested parties to file *amicus* briefs in its order of June 17, 2016, and respectfully submit this brief as *amici curiae*.

ARGUMENT

In seeking supplemental briefing, the ARB posed two questions:

- 1) In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?
- 2) If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence that the ALJ may consider?

The answer to both questions is no. At least eight federal statutes either expressly adopt or repeat verbatim the burden-of-proof provisions addressed in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014) and *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Mar. 20, 2015) (reissued with full dissent Apr. 21, 2015). When the *Fordham* panel, by a 2-1 vote, held that judges may not consider an employer's evidence of causation in assessing whether protected activity was a contributing factor in a complained of adverse employment action, it upset the careful balance crafted and repeatedly adopted by Congress. The Board's now-vacated *Powers* decision failed to correct these

problems. These decisions also flew in the face of settled judicial interpretation of those provisions. No federal court has even suggested that the FRSA imposes the lopsided and distorted assessment of contributory cause that *Fordham* would require. The Federal Circuit authority invoked by the panel addressed a significantly different statutory provision that only highlights the textual error of the *Fordham* decision. The Board, sitting en banc, should repudiate *Fordham*'s novel rule and instead apply the burdens of proof as written by Congress and consistently interpreted in the courts. By design, those standards impose a lower "preponderance of the evidence" burden on complainants and a higher "clear and convincing" burden on employers, but they do not automatically guarantee that complainants satisfy their "preponderance of the evidence" burden by removing all, or any particular kinds, of evidence from the employer's side of the balance.

- I. **AN ALJ MUST CONSIDER, AT THE CONTRIBUTING FACTOR PHASE, AN EMPLOYER'S EVIDENCE THAT PROTECTED ACTIVITY DID NOT CONTRIBUTE TO AN ADVERSE ACTION**
 - A. **The AIR 21 Statutory Framework Requires Consideration of an Employer's Evidence Regarding Whether Protected Conduct Was a Contributing Factor**
 1. **Complainants Must Establish That Protected Conduct Was a Contributing Factor by a Preponderance of the Evidence**

Numerous federal statutes covering railroad and transportation safety, financial misconduct, health care, and other important areas apply the same burdens of proof in alleged retaliation cases. The FRSA, 49 U.S.C. § 20109(d)(2)(A)(i), as well as the Sarbanes-Oxley Act of 2002 ("SOX") at issue in *Fordham*, 18 U.S.C. § 1514A(b)(2)(C), expressly incorporate the burdens of proof in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). So too does the STAA, as amended in 2007. *See* 49

U.S.C. § 31105(b)(1). Other statutes, without express incorporation, restate the same formula. See Energy Reorganization Act (“ERA”), 42 U.S.C. § 5851(b)(3)(A)-(D); Consumer Financial Protection Act (“CFPA”), 12 U.S.C. § 5567(c)(3)(A)-(C) (part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010); Consumer Product Safety Improvements Act (“CPSIA”), 15 U.S.C. § 2087(b)(2)(B)(i)-(iv). Similarly, the Affordable Care Act, 29 U.S.C. § 218C(b)(1), incorporates by reference the burdens of proof in the CPSIA, which are substantively identical to those in AIR 21.

The AIR 21 framework imposes different burdens of proof on a complainant based on the stage of his or her case. Initially, the Secretary of Labor may not conduct an investigation “*unless the complainant makes a prima facie showing that [protected behavior] was a contributing factor in the unfavorable personnel action alleged.*” 49 U.S.C. § 42121(b)(2)(B)(i) (emphasis added). At the hearing stage, on the other hand, the Secretary “may determine that a violation . . . has occurred *only if the complainant demonstrates* that any [protected conduct] was a contributing factor in the unfavorable personnel action alleged.” 49 U.S.C. § 42121(b)(2)(B)(iii) (emphasis added). In either case, the employer may either prevent an investigation or preclude relief if it “*demonstrates by clear and convincing evidence* that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C. § 42121(b)(2)(B)(ii) and (iv) (emphasis added).

Congress therefore made two important distinctions. Most obviously, it distinguished between the complainant’s burden, which is lighter, and that of the employer, which is heavier. Just as importantly, however, Congress distinguished between the showing a complainant must make to warrant an investigation, and the showing the same complainant must make to support a

finding of a violation. To warrant an investigation, the complainant need make only a “prima facie showing” that protected conduct was a contributing factor. 49 U.S.C. § 42121(b)(2)(B)(i). Prima facie is a term of art typically used to denote evidence “[s]uch as will prevail until contradicted and overcome by other evidence.” Black’s Law Dictionary (5th ed. 1979). It is a “cardinal rule of statutory construction” that where Congress uses specialized terms that have acquired an accepted meaning, “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” *Molzof v. United States*, 502 U.S. 301, 308 (1992) (internal quotation omitted). Therefore, at the pre-investigation stage under subparagraph (i), the Secretary must look only to the complainant’s allegations and evidence in assessing whether she has made a sufficient showing that protected activity was a contributing factor in the challenged adverse action.

The statute sets forth a different burden at the hearing stage. There, the complainant must not merely make out a prima facie case, but must “demonstrate[] that any [protected conduct] was a contributing factor in the unfavorable personnel action alleged.” 49 U.S.C. § 42121(b)(2)(B)(iii). As several courts have noted, this is a higher standard. The complainant must demonstrate “that the protected activity *was a contributing factor* in the adverse action, and not merely show that the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.” *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 447, n.5 (2d Cir. 2013) (internal quotations omitted) (emphasis added); *accord Feldman v. Law Enforcement Assocs.*, 752 F.3d 339, 344, n.6 (4th Cir. 2014). Courts have uniformly held that this language calls for a preponderance of the evidence standard: “The term ‘demonstrates’

means to prove by a preponderance of the evidence.” *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76, n.1 (5th Cir. 2008) (citing *Dysert v. U.S. Sec’y of Labor*, 105 F.3d 607 (11th Cir. 1997)); *see, e.g., Feldman*, 752 F.3d at 344-45 (interpreting AIR 21 as incorporated by SOX); *Bechtel*, 710 F.3d at 447, 451 (2d Cir. 2013) (SOX); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013) (FRSA); *Formella v. U.S. Dep’t of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) (STAA); *Addis v. Dep’t of Labor*, 575 F.3d 688, 690-91 (7th Cir. 2009) (ERA).¹

The Department of Labor has also determined, in regulations binding on the Administrative Review Board, that subparagraph (iii) of the AIR 21 framework requires proof by a preponderance of the evidence. *See, e.g.,* 29 C.F.R. § 1980.109(a) (implementing SOX); 29 C.F.R. § 1982.109(a) (implementing FRSA).

¹ Perhaps confused by the different concept of a prima facie case under Title VII, some courts applying the AIR 21 framework have referred to the complainant’s showing under subparagraph (iii) as “a prima facie case.” *See, e.g., Araujo*, 708 F.3d at 159. The *Fordham* majority used this imprecision in terminology effectively to eliminate the distinction between making a “prima facie showing” under subparagraph (i) and “demonstrat[ing]” contributing factor under subparagraph (iii). *See slip op.* at 18. In its view, a complainant need only *allege* a prima facie case under subparagraph (i), while she must *present evidence* for a prima facie case under subparagraph (iii). *See id.* Yet this reasoning cannot be reconciled with the uniform holdings of the federal courts, and the binding regulations by the Department of Labor, that a complainant must meet her burden under subparagraph (iii) by a preponderance of the evidence. *See, e.g., Araujo*, 708 F.3d at 157 (requiring that the complainant make what it refers to as the “prima facie case” under subparagraph (iii) by a preponderance of the evidence). As will be shown in section I.B., *infra*, a “preponderance of the evidence” standard requires consideration of the party’s evidence and that opposing it. By barring a judge from considering the employer’s evidence, *Fordham* bars any assessment of the preponderance of the evidence. Thus, in effect, *Fordham* allows a complainant to satisfy subparagraph (iii) with nothing more than minimal evidence on contributory factor, not a preponderance.

2. Preponderance of the Evidence Requires Consideration of the Entire Record

Unlike the prima facie showing the complainant must make at the pre-investigation stage, the preponderance of the evidence standard requires, by definition, that the complainant's evidence is weighed against the employer's. Preponderance, by definition, refers to "superiority or excess of weight, influence, power number, etc.; *an outweighing*." Webster's New International Dictionary 1952 (2d ed. 1945) (emphasis added). Thus, juries are commonly instructed that a preponderance standard requires them to weigh all of the evidence. Accepting a common expression of the standard, the Sixth Circuit approved jury instructions in a Title VII case "defin[ing] preponderance of the evidence as 'such evidence as, *when considered and compared with that opposed to it*, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.'" *Williams v. Eau Claire Public Schools*, 397 F.3d 441, 446 (6th Cir. 2005) (emphasis added). The Department of Labor has embraced essentially the same formulation in various circumstances. See 29 C.F.R. § 1471.990 ("Preponderance of the evidence means proof by information that, *compared with information opposing it*, leads to the conclusion that the fact at issue is more probably true than not") (emphasis added); 29 C.F.R. § 98.990 ("Preponderance of the evidence means proof by information that, *compared with information opposing it*, leads to the conclusion that the fact at issue is more probably true than not") (emphasis added). Courts uniformly adhere to the view that a preponderance of the evidence means a weighing of evidence on both sides. The Ninth Circuit's model jury instruction on preponderance of the evidence, for example, states:

When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be

persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Ninth Circuit Manual of Model Jury Instructions - Civil, 1.3 (<http://www3.ce9.uscourts.gov/jury-instructions/model-civil>) (emphasis added).

Within the AIR 21 framework, courts have therefore consistently held that judges must evaluate the contributing factor requirement based on the entire record. Reviewing an ALJ's contributing factor determination in a case under the ERA, which is in relevant respects worded identically to AIR 21, the Seventh Circuit held that the ALJ properly determined that "the evidence [the complainant] presented was outweighed by the entire record." *Addis*, 575 F.3d at 692. In determining that protected activity was not a contributing factor in the complainant's dismissal, the court approved of the ALJ weighing the employer's evidence regarding the complainant's employment history and making credibility determinations between the complainant's and the employer's witnesses. *See id.* It found that the temporal proximity on which the complainant relied was "mitigated" by evidence presented by the employer. *Id.* Similarly, in *Feldman*, applying AIR 21 as incorporated by SOX, the court held, based on a review of both sides' evidence, that the complainant "has not shown that it is more likely the case than not that this particular activity [the protected activity] played a role in his termination." *Feldman*, 752 F.3d at 349. Notably, the court acknowledged that the contributing factor standard is meant to be "quite broad and forgiving" in SOX cases, but concluded it would be "toothless" if the court disregarded the other evidence and intervening events in the record. *Id.* at 350.

This is the only sensible way to read the statute because at bottom, subparagraph (iii) requires the judge to answer a factual question: did the protected conduct contribute, not necessarily in a significant or predominant way, but contribute at all, to the adverse employment action. The judge cannot answer that question without considering both the complainant's evidence and any countervailing evidence that the protected conduct did not contribute to the employer's decision at all. To illustrate the nonsensical nature of *Fordham*'s contrary rule, the dissenting judge in *Fordham* postulated a situation in which a company fired all of its employees, including one SOX-protected employee, due to a financial collapse. *See Fordham*, slip op. at 41. Under the *Fordham* approach, the SOX-protected employee could, "contrary to the law and basic notions of fundamental fairness and logic," *id.*, demonstrate that the protected conduct was a contributing factor in his termination, based on nothing more than temporal proximity, regardless of any evidence the employer presented about the real reasons for the mass layoff.

This is no mere hypothetical. The Seventh Circuit faced an analogous situation in *Harp v. Charter Communications, Inc.*, 558 F.3d 722 (7th Cir. 2009) (applying the AIR 21 framework as incorporated in SOX). There, the complainant was part of a reduction-in-force that laid off 50 employees, including the complainant's entire department. She claimed, however, that she was fired for reporting certain payment practices that violated Sarbanes-Oxley and that she had the temporal proximity to "prove" it. The employer responded with evidence of the reduction-in-force and the financial distress behind it. *See id.* at 727-28. The *Fordham* majority would have ignored that evidence, but the Seventh Circuit deemed it critical. The court considered, but ultimately rejected on a review of the entire record, the complainant's argument that "the entire reduction of force was a ruse." *Id.* at 727. The court criticized complainant for analyzing the

temporal proximity issue (as *Fordham* would require) “as if she were the only person subjected to the RIF. . . . [T]he sheer scope of the RIF is relevant to what inference may reasonably be drawn.” *Id.* It concluded that the complainant had “no evidence indicating that her termination was attributable to something other than the financial problems that necessitated the RIF.” *Id.*²

That situation illustrates why the *Fordham* majority was wrong to claim that “[a]n employer’s legitimate business reasons may neither factually nor legally negate an employee’s proof that protected activity contributed to an adverse action.” Slip op. at 23. Quite to the contrary, evidence supporting the employer’s proffered reason may (though it often may not) negate any inference that might otherwise be drawn from the facts. Taking *Harp* to a greater, although not inconceivable, extreme, are we to believe that if the company had declared bankruptcy and laid off its entire workforce, that such evidence would have no bearing on whether an individual employee’s protected conduct contributed to the decision to terminate him? The statute requires the complainant to “demonstrate[] that any [protected conduct] was a contributing factor in the unfavorable personnel action alleged.” 49 U.S.C. § 42121(b)(2)(B)(iii). It defies common sense to think that such a burden can be met, much less by the preponderance of the evidence, without weighing any countervailing considerations that suggest a more plausible, independent cause for the employment action.

Holding otherwise would allow and even encourage complainants to engage in strategic behavior to enhance a meritless claim. For example, imagine a truck driver who is involved in a

² A dissenting judge disagreed that complainant had not presented enough to get to a jury, although he had “no quarrel with the legal parameters well laid out in the majority opinion” and thus no dispute with the relevance of the employer’s evidence. *Harp*, 558 F.3d at 728 (Tinder, J., dissenting).

collision. While the motor carrier reviews the accident to determine whether the driver could have avoided the collision, the driver might subsequently make a protected safety-related complaint, such as that he was forced to drive while feeling ill on a particular day. Shortly thereafter, if the motor carrier determined that the accident was avoidable and terminated the driver for his poor performance, the driver could bring an STAA claim and, under *Fordham's* standard, conclusively establish the contributing factor requirement solely based on evidence that he engaged in protected activity, the carrier knew it, and the carrier fired him soon after. Under *Fordham*, the carrier would be barred from showing, based on the accident investigation, that the protected activity had nothing at all to do with the carrier's termination. The carrier could only preclude "relief" by proving by clear and convincing evidence that it would have fired him anyway, rather than merely having to show by a preponderance that the protected activity was not a factor at all. There is no warrant in the statute to so distort the determination of what constituted a contributing factor in the employment decision.

Moreover, post-*Fordham* ARB decisions have recognized the unworkable nature of the *Fordham* rule that an ALJ cannot consider an employer's evidence of causation when determining whether the complainant established by a preponderance of the evidence that protected conduct was a contributing factor in the complained of adverse action. In *Ledure v. BNSF Railway Co.*, ARB No. 12-044, ALJ No. 2012-FRS-020, slip op. at 8 (June 2, 2015), for example, the ARB retreated from *Fordham*, stating that "[t]he ALJ has the right to consider any evidence that is relevant to the question of causation, including the employer's explanation for

why it did what it did.”³ The ARB then affirmed the ALJ’s finding that the complainant had not met that burden, as the ALJ correctly considered the employer’s “non-retaliatory explanations for its actions” in determining that the protected activity did not contribute to the adverse action. *Id.* at 9; see also *Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 3-4 (Feb. 18, 2016) (affirming that the ALJ properly considered the employer’s non-retaliatory reasons for terminating the complainant when determining that the complainant did not meet his burden under the contributing factor element of SOX); *Nelson v. Energy Northwest*, ARB No. 13-075, ALJ No. 2012-ERA-0002, slip op. at 11 (Sept. 30, 2015) (finding that the ALJ did not abuse his discretion in considering the employer’s explanations as evidence on the issue of contributing factor causation in an ERA claim); *Stewart v. Lockheed Martin Aeronautics Co.*, ARB No. 14-033, ALJ No. 2013-SOX-019, slip op. at 2-3 (Sept. 10, 2015) (affirming an ALJ’s finding that the complainant did not meet her burden at the contributing factor stage of her SOX claim after weighing the employer’s rationale and evidence).

³ In its *Ledure* decision, the ARB cited *Powers*, ARB No. 13-034. *Powers*, which the Board vacated on May 23, 2016, purported to reaffirm *Fordham*, but then “clarifie[d]” that “there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation as long as the evidence is relevant to that element of proof.” *Id.* at 13, 21. Moreover, the *Powers* majority held that *Fordham* did not “foreclose consideration of specific evidence [at the contributing factor stage] that may otherwise support a respondent’s affirmative defense,” including the employer’s conduct and rationale. *Id.* at 13. The now-vacated *Powers* decision compounded, rather than mitigated, the confusion.

B. *Fordham's* Interpretation Conflicts with the Text and Settled Interpretation of the AIR 21 Framework

1. *Fordham* Creates a Different Burden-Shifting Regime than the Statute Requires

The *Fordham* rule cannot be squared with the complainant's burden to establish contributing factor by a preponderance of the evidence. As explained above, "preponderance of the evidence" requires the weighing of evidence for and against the proposition in question, while *Fordham* expressly requires the judge to disregard any evidence the employer might submit on contributing cause, thus avoiding any weighing at all. Although the *Fordham* majority purported to apply a preponderance standard, it instead created a different burden-shifting regime in which subparagraph (iii) requires only that the complainant make a "prima facie" case – rather than "demonstrate" by a preponderance of the evidence – that a protected activity was a contributing factor. The employer could then rebut that case only by clear and convincing evidence under subparagraph (iv). That is not what Congress required.

Nor does allowing the employer to dispute contributing factor causation under subparagraph (iii) undermine the higher burden it faces under subparagraph (iv). Subparagraphs (iii) and (iv) are not, as the *Fordham* majority read them, *see slip op.* at 21-22, two sides of the same issue. They ask different questions. Subparagraph (iii) asks whether the protected conduct was a *contributing* factor in the adverse employment action.⁴ The complainant bears the burden of "demonstrating" that point. Although the standard has been described as "broad and

⁴ A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Araujo* 708 F.3d at 158 (quotation marks & citation omitted).

forgiving,” *Feldman*, 752 F.3d at 350, it nonetheless requires the finder of fact to make an assessment that the protected activity contributed in some way.

If the protected conduct did contribute to the adverse employment decision, subparagraph (iv) affords the employer an affirmative defense. It asks whether the employer nevertheless *would have* made the same decision in the absence of the protected activity. The employer bears the burden of proof on this, and it is a high one requiring “clear and convincing evidence,” rather than simply a preponderance. Under subparagraph (iv), the judge weighs “the combined effect of at least three factors applied flexibly on a case-by-case basis”: (1) “how ‘clear’ and ‘convincing’ the independent significance is of the non-protected activity”; (2) “the facts that would change in the ‘absence of’ the protected activity”; and (3) “the evidence that proves or disproves whether the employer ‘would have’ taken the same adverse actions.” *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, 2014 DOL Ad. Rev. Bd. LEXIS 28, at *29 (ARB Apr. 25, 2014). Although subparagraph (iii) focuses on whether protected activity was *one* reason for the action directed at the complainant, subparagraph (iv) addresses “but for” causation. Accordingly, the analysis under subparagraph (iv) might entail a more far-reaching inquiry into how the employer has treated others in similar circumstances. *See Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792-93 (8th Cir. 2014) (affirming summary judgment to employer on former employee’s FRSA claim where employer showed by clear and convincing evidence that it treated plaintiff identically to two other similarly situated employees). That Congress put the burden on the employer to prove what it *would have done* in the absence of protected activity, by clear and convincing evidence, is entirely consistent with first requiring the complainant to

prove, based on the record as a whole, that the protected activity did contribute in some way to the employer's decision.

2. *Fordham* Renders Subparagraph (iii) a Nullity

While subparagraphs (iii) and (iv) therefore apply different burdens and standards of proof to different issues, the *Fordham* majority's decision would render subparagraph (iii) superfluous. Barring consideration of the employer's evidence under subparagraph (iii) leaves the judge to address only whether the complainant's evidence, standing alone, has made a "prima facie" showing of contributing factor.⁵ Yet that is what subparagraph (i) already requires before an investigation. Subparagraph (i) expressly requires that the complainant have made "a prima facie showing" that the protected conduct was a contributing factor. If subparagraph (iii) requires nothing more, as *Fordham* holds, then the determination under subparagraph (iii) is automatic. The Supreme Court has long recognized, however, that it must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538 (1955); see also *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). The *Fordham* majority violated this central canon of statutory construction by interpreting subparagraph (iii) simply to repeat what subparagraph (i) already requires. By disregarding the weighing of evidence inherent in Congress's distinction between "prima facie showing" in subparagraph (i) and "demonstrate" in subparagraph (iii), it renders subparagraph (iii) duplicative and unnecessary.

⁵ Even the *Fordham* majority acknowledged that the judge would weigh the employer's evidence on the other elements of the complainant's prima facie case. See slip op. at 23, 33 n.84.

3. *Fordham* Erred in Relying on Precedent under the Differently Structured and Worded Whistleblower Protection Act

Rather than relying on the extensive precedent described above, which applies the AIR 21 framework, the *Fordham* majority sought support for its unprecedented holding in cases applying a significantly different statute. *Fordham* relied principally on *Kewley v. Dep't of Health and Human Services*, 153 F.3d 1357 (Fed. Cir. 1998), which construed the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 1221. *Fordham*'s reliance on *Kewley* and other authority under the WPA is misplaced, however, because the WPA departs from the AIR 21 framework in two fundamental ways.

First, unlike AIR 21, SOX, FRSA, STAA, ERA, CPSIA, CFPA, or ACA, Congress amended the WPA specifically to allow a complainant to establish that protected conduct was a contributing factor based only on an employer's knowledge of the activity coupled with temporal proximity to the adverse employment action. It added the following to what is subparagraph (iii) of the AIR 21 framework:

... The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

5 U.S.C. § 1221(e)(1). If those two elements are met, the judge "may" find that the contributing factor requirement has been met. One could debate whether the provision's permissive phrasing ("may") should preclude a judge from considering other evidence, but in any event it was those

specific provisions relating to temporal proximity which, according to *Kewley*, “guarantee[] that the employee establishes a prima facie case simply by demonstrating that the knowledge and reasonable time requirements were met.” 153 F.3d at 1363-64 (emphasis added). Neither AIR 21 nor any of its statutory brethren include such a guarantee.⁶

Courts applying the AIR 21 framework have recognized as much. In *Araujo*, the only circuit court case outside of the Federal Circuit to have even cited *Kewley*, the court acknowledged *Kewley* but, applying the FRSA, carefully weighed the employer’s evidence on contributing factor before determining that the complainant had presented sufficient evidence to create a factual question as to the contributing factor element. *See Araujo*, 708 F.3d at 160-61. Similarly, in another FRSA case, the Eighth Circuit expressly “reject[ed] the notion – suggested in some ARB decisions – that temporal proximity without more, is sufficient” to satisfy the complainant’s burden under subparagraph (iii). *Kuduk*, 768 F.3d at 792 (holding that, despite temporal proximity, the employer’s evidence of an intervening event that “independently justified adverse disciplinary action” refuted the complainant’s attempt to satisfy the contributing factor element); *see also BNSF R. Co. v. U.S. Dep’t of Labor*, 816 F.3d 628, 633 (10th Cir. 2016) (weighing both the employer’s and the complainant’s evidence before determining that the complainant proved the contributing factor element by a preponderance of the evidence).

Second, the WPA, unlike AIR 21, SOX, FRSA, STAA, ERA, CPSIA, CFPA, or ACA, requires the complainant to show only causation in fact, not “discriminat[ion].” *Compare* 5

⁶ Oddly, the *Fordham* majority highlighted the WPA’s additional language, slip op. at 31, n.76, and analyzed its legislative history in depth without ever acknowledging that the statute before it (just as the statute in this case) does not include that language. *Cf. Fordham*, slip op. at 29 (asserting, incorrectly, that the relevant language is “virtually identical”).

U.S.C. § 1221(a) (WPA) *with* 49 U.S.C. § 42121(a) (AIR 21); 18 U.S.C. § 1514A(a) (SOX); 49 U.S.C. § 20109(a) (FRSA); 49 U.S.C. § 31105(a) (STAA); 42 U.S.C. § 5851(a) (ERA); 15 U.S.C. § 2087(a) (CPSIA); 12 U.S.C. § 5567(a) (CFPA); 29 U.S.C. § 218C(a) (ACA); *see also* *Kuduk*, 768 F.3d at 791, n. 4 (noting that “*Marano* [v. *Dep’t of Justice*, 2 F.3d 1137, 1139-41 (Fed. Cir. 1993)] was construing a federal employee whistleblower statute that required only an ultimate showing of causation in fact (‘because of’), not discrimination. *Id.* at 1139-41.”). The distinction is important because under the AIR 21 framework, while a complainant need not conclusively show the employer’s motive, “the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.” *Kuduk*, 768 F.3d at 791. Knowledge and temporal proximity may, depending on the particular facts of the case and the context of the employer’s action, tend to “demonstrate” the intentional retaliation required, but the statute does not and should not presume it. Because the WPA addresses a fundamentally different statutory standard, *Fordham* erred in giving controlling weight to precedent decided under it.

II. THERE ARE NO LIMITS, WITHIN THE ORDINARY RULES OF EVIDENCE, ON THE TYPES OF EVIDENCE AN ALJ MAY CONSIDER IN ASSESSING “CONTRIBUTING FACTOR”

The ARB’s second question asked whether there are “any limitations on the types of evidence that the ALJ may consider” in assessing contributing factor. The answer is no. The ARB’s now-vacated *Powers* decision erred in suggesting that evidence of a subjective non-retaliatory motive was somehow “irrelevant” to the contributing factor analysis, and therefore could not be considered, simply because a complainant need not prove retaliatory motive. *See Powers*, ARB No. 13-034, slip op. at 20-26. As the OALJ Rules provide, “relevant evidence

means evidence *having any tendency* to make the existence of *any fact* that is *of consequence* to the determination of the action more probable or less probable than it would be without the evidence.” 29 C.F.R. § 18.401 (emphasis added). Analyzing this element-by-element, as the ARB did in *Powers*, it should be apparent that evidence of a subjective non-retaliatory *motive*, or indeed of any motive at all, is *relevant* to the contributing factor inquiry. Evidence regarding why the employer took an adverse action may or may not persuade the finder of fact, but it certainly has some bearing on the assessment of whether an impermissible factor contributed to the decision. (See, e.g., above, pp. 10-11.) Saying that the complainant need not conclusively disprove such a motive, see *Powers*, ARB No. 13-034, slip op. at 25, does not thereby render any such motive irrelevant – that is, lacking “any tendency” to make a fact of consequence more or less likely – to the “contributing factor” analysis. A non-retaliatory motive may, in some circumstances, tend to make it less likely that a protected conduct contributed to the employer’s decision. That is for the factfinder to decide, applying the appropriate preponderance-of-the-evidence standard. Therefore, based on the statutory scheme and settled interpretation in the courts set out in Section I above, such evidence must be fully considered and weighed by the ALJ.

CONCLUSION

For the foregoing reasons, the ARB should repudiate the novel rule adopted in *Fordham* and allow judges to consider an employer’s evidence in assessing whether a complainant has “demonstrate[d] that any [protected conduct] was a contributing factor in the unfavorable personnel action alleged.”

Dated: August 3, 2016

Respectfully submitted,



James E. Gauch
Jacqueline M. Holmes
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
E-mail: jegauch@jonesday.com
E-mail: jholmes@jonesday.com

Steven P. Lehotsky
Warren Postman
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

**COUNSEL FOR *AMICUS CURIAE*
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA**

Richard Pianka
ATA Litigation Center
950 N. Glebe Rd.
Arlington, VA 22203
Telephone: (703) 838-1889

**COUNSEL FOR *AMICUS CURIAE*
AMERICAN TRUCKING ASSOCIATIONS,
INC.**

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2016, a true and correct copy of the foregoing was served by facsimile and by UPS overnight mail on:

Administrative Review Board
U.S. Department of Labor
Suite S-5220
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Facsimile: (202) 693-6220

I further certify that a true and correct copy of the foregoing was served by U.S. Mail on the persons and at the addresses listed below:

F. Tucker Burge, Esq.
Attorney for Complainant Kenneth Palmer
Burge & Burge, P.C.
2001 Park Place, Suite 850
Birmingham, Alabama 35203

George H. Ritter, Esq.
Attorneys for Respondent Canadian National
Railway/Illinois Central Railroad Co.
Wise Carter Child & Caraway P.A.
P.O. Box 651
Jackson, Mississippi 39205

Constance Valkan, Esq.
Canadian National Railway/Illinois Central
Railroad Co.
Law Department
17641 Ashland Avenue
Homewood, Illinois 60430





Facsimile Transmission

51 Louisiana Avenue, N.W. • Washington, D.C. 20001-2113 • 202/879-3939
Facsimile: 202/626-1700

Please hand deliver the following facsimile to:

To: Administrative Review Board
Company:
Fax: 202-693-6220

Date: 8/3/2016 9:25:16 AM
Pages: 23

From: McArthur, Nikki L.
Phone: +1.202.879.3843

Message:

To the Clerk of the ARB:

Pursuant to the June 17, 2016 order setting en banc review, please find enclosed the brief of amici curiae Chamber of Commerce of the United States of America and American Trucking Associations, Inc., in support of the Respondent in *Palmer v. Canadian Nat'l Ry. / Ill. Cent. R.R. Co.*, ARB No. 16-035.

An original and four copies has also been sent to the Administrative Review Board by overnight delivery.

NOTICE: This communication is intended to be confidential to the person to whom it is addressed, and it is subject to copyright protection. If you are not the intended recipient or the agent of the intended recipient or if you are unable to deliver this communication to the intended recipient, please do not read, copy or use this communication or show it to any other person, but notify the sender immediately by telephone at the direct telephone number noted above.

Please call the sender immediately if the facsimile you receive is incomplete or illegible.

ALHOKBAR • AMSTERDAM • ATLANTA • BEIJING • BOSTON • BRISBANE • BRUSSELS • CHICAGO • CLEVELAND • COLUMBUS • DALLAS • DETROIT
DUBAI • DUSSELDORF • FRANKFURT • HONG KONG • HOUSTON • IRVINE • JEDDAH • LONDON • LOS ANGELES • MADRID • MEXICO CITY
MIAMI • MILAN • MOSCOW • MUNICH • NEW YORK • PARIS • PERTH • PITTSBURGH • RIYADH • SAN DIEGO
SAN FRANCISCO • SAO PAULO • SHANGHAI • SILICON VALLEY • SINGAPORE • SYDNEY • TAIPEI • TOKYO • WASHINGTON